Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–114 OF 2010
ABDUL WAHAB PATAIL, CLEMENT SKINNER JJCA AND MAH WENG KWAI J
27 JULY 2012

Administrative Law — Exercise of administrative powers — Judicial review — Whether High Court right to quash Home Minister's decision to ban book — Book in circulation for two years before ban order — Whether any evidence book prejudiced public order when in circulation — Whether decision to ban book on ground it was prejudicial to public order irrational and reeked of Wednesbury unreasonableness

The respondent had succeeded in its judicial review application before the High Court to quash the appellant's decision under s 7(1) of the Printing Presses and Publications Act 1984 ('Act') to ban a book entitled 'Muslim Women and the Challenges of Islamic Extremism' ('the book'). The book was banned on the ground it was prejudicial to public order although it had been in circulation for about two years before the ban. JAKIM had also considered the book to have infringed its guidelines as its contents could allegedly confuse Muslims, in particular Muslim women. The appellant appealed to the Court of Appeal against the High Court's decision.

Held, dismissing the appeal with costs:

(1) The appellant's decision to ban the book was flawed and not exercised in accordance with s 7(1) of the Act (see para 21).

(2) If in the two years the book was in circulation no prejudice to public order had occurred, it followed that the book was in the first place unlikely to be prejudicial to public order. To be satisfied the book was prejudicial to public order in face of the fact no such prejudice had occurred during the two years it was in circulation was so outrageous in its defiance of logic that it fell squarely within the meaning of *Wednesbury* unreasonableness and of irrationality (see para 19).

(3) Even if the book infringed JAKIM guidelines, that did not address the issue of it being prejudicial to public order (see para 21).

[Bahasa Malaysia summary

Responden telah berjaya dalam permohonan semakan kehakimannya di hadapan Mahkamah Tinggi untuk membatalkan keputusan perayu di bawah

Akta Mesin Cetak dan Penerbitan 1984 ('Akta') untuk mengharamkan buku bertajuk 'Muslim Women and the Challenges of Islamic Extremism' ('buku'). Buku tersebut diharamkan atas alasan ia menjejaskan ketenteraman awam walaupun ia berada dalam peredaran lebih kurang dua tahun sebelum pengharaman tersebut. JAKIM juga mempertimbangkan buku tersebut telah melanggar garis panduannya kerana isi kandungannya didakwa boleh mengelirukan orang Islam, terutamanya wanita Islam. Perayu merayu kepada Mahkamah Rayuan terhadap keputusan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Keputusan perayu untuk mengharamkan buku tersebut adalah cacat dan tidak dilaksanakan mengikut s 7(1) Akta (lihat perenggan 21).

(2) Jika dalam masa dua tahun buku tersebut berada dalam peredaran ia tidak menjejaskan ketenteraman awam, oleh itu buku tersebut pada dasarnya tidak mungkin menjejaskan ketenteraman awam. Untuk memuaskan hati bahawa buku tersebut menjejaskan ketenteraman awam pada hakikatnya ia tidak berlaku semasa dua tahun ia berada dalam peredaran, adalah melampau dengan tidak ada alasan yang logik bahawa ia terangkum dalam maksud 'Wednesbury unreasonableness' dan dalam keadaan yang tidak rasional (lihat perenggan 19).

(3) Walaupun buku tersebut melanggar garis panduan JAKIM, ia tidak menanggani isu yang ia menjejaskan ketenteraman awam (lihat perenggan 21).]

Notes

For cases on judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 82–108.

Cases referred to

Cameron (AP) v Gibson & Anor [2005] ScotsCS CSIH 83 (refd)

Council of Civil Service Unions and Ors v Minister for the Civil Service [1985] AC 374, HL (refd)

Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 3 MLJ 307; [2010] 1 CLJ 300, FC (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417; [1991] 1 CLJ 881, SC (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789; [1997] 2 CLJ 11, SC (refd)

Michael Lee Fook Wah v Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 MLJ 305; [1998] 1 CLJ 227, CA (refd)

Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9; [1990] 1 CLJ Rep 195, SC (refd)

Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72; [2002] 4 CLJ 105, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
T Ganeswaran lwn Suruhanjaya Polis Di Raja Malaysia dan satu lagi [2005] 6 MLJ 97; [2005] 3 CLJ 302, CA (refd)

Legislation referred to

Printing Presses and Publications Act 1984 s 7(1)

Appeal from: Application for Judicial Review No R3–25–347 of 2008 (High Court, Kuala Lumpur)

Noor Hisham bin Ismail (Senior Federal Counsel) (Kogilambigai Muthusamy with him) (Federal Counsel) (Attorney General's Chambers) for the appellant.
Malik Imtiaz Sarwar (K Shanmuga, Aston Paira, Azira Aziz and Danial Abdul Rahman with him) (Azzat &Izzat) for the respondent.

Abdul Wahab Patail JCA:

[1] On 25 January 2010, the High Court quashed the decision by the appellant to ban a book entitled *Muslim Women and the Challenges of Islamic Extremism* ('the book'), a compilation of essays submitted for an international roundtable meeting called 'Muslim Women Challenge Religious Extremism — Building Bridges between Southeast Asia and the Middle East' held in Italy from 30 September–2 October 2003.

[2] The ban was made pursuant to an order in the Printing Presses and Publications (Control of Undesirable Publications) (No 5) Order 2008 (PU(A) 261/2008) and gazetted on 31 July 2008.

[3] Section 7(1) of the Printing Presses and Publications Act 1984 (Act 301) provides:

> If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

[4] The Minister is vested with absolute discretion to prohibit either

absolutely or in part or subject to conditions, a publication and future publications of the publisher concerned provided he is satisfied any part of it is:

(a) in any manner prejudicial to or likely to be prejudicial to public order, morality, security; or

(b) likely to alarm public opinion; or

(c) likely to be contrary to any law; or

(d) likely to be prejudicial to public interest or national interest.

[5] Although the power to ban is at his absolute discretion, it is dependent upon the Minister being satisfied as to these precedent objective facts.

[6] In his affidavit affirmed on 27 October 2009, the appellant stated that the reason for the prohibition was:

> … Saya sesungguhnya menyatakan bahawa buku itu memudaratkan ketenteraman awam apabila terdapat isi kandungannya yang mengandungi fahaman serta aliran pemikiran yang bertentangan dengan akidah dan hukum Islam serta fatwa dan Jumhur Ulama pegangan Ahli Sunnah Wal Jamaah dalam negara ini. Butir-butir lanjut tentangnya adalah seperti mana surat pihak saya bertarikh 14 Ogos 2008 dan 5 November 2008 (eksibit P4 dan P9 masing-masing dalam afidavit Pemohon).

[7] The appellant had thus relied upon the ground that the book was prejudicial to public order and not on the ground that it was likely to be prejudicial to public order.

[8] The book was in circulation for about two years before the appellant's order to ban it. Be that as it may, it is clear that the appellant was satisfied that the book was prejudicial to public order, and had therefore exercised the absolute discretion vested upon him by s 7(1) to prohibit the circulation of the book.

[9] The respondents were dissatisfied with that exercise of administrative discretion, and have sought judicial review to quash that administrative decision.

[10] It is trite law that judicial review is not an appeal. In an appeal the court reviews the conduct of trial and the findings of the court appealed from, and if that court had erred in law or principle or in a finding of fact, and such error led that court to a decision it would otherwise not have made, the appellate court would intervene to correct the error by exercising the powers of the court appealed from. The accepted approach in judicial review of administrative decision 'exercising administrative discretion differs in that the court will not

take upon itself the role and usurp the powers of the executive, but exercises its supervisory jurisdiction by examining the exercise of the administrative discretion. See *Michael Lee Fook Wah v Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 MLJ 305; [1998] 1 CLJ 227 (CA).

[11] The first step of such examination is whether the administrative decision is ultra vires or not. In a passage cited with approval by the Federal Court in *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307; [2010] 1 CLJ 300 (FC), Lord Kingarth in *Cameron (AP) v Gibson & Anor* [2005] ScotsCS CSIH 83, observed that:

> 17. Equally, the fact that the order may have been made by reason of a mistake in fact or law cannot affect the conclusion that the order was one made ultra vires. Just as when power is given by Parliament to administrative bodies or tribunals to act in limited circumstances, it is well-established that such bodies cannot, by their own mistake of fact or law in relation to matters circumscribing the limits of their powers, give themselves powers which they do not have …

[12] Hence, an administrative decision may be quashed if it is ultra vires per se by exceeding the discretion that is granted.

[13] It is self evident that the adversarial process of litigation in the courts between parties to the litigation is ill-equipped to deal with matters of public policy, national interest, public safety or national security (see *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 (SC)) or policy considerations (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 (PC)).

[14] Although the court will not readily question administrative decisions, it is the duty of the court to intervene in an application for review of that decision if it was ultra vires, or unfairly or unjustly exercised. See *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417; [1991] 1 CLJ 881 (SC). It arises in this manner. In *T Ganeswaran lwn Suruhanjaya Polis Di Raja Malaysia & satu lagi* [2005] 6 MLJ 97; [2005] 3 CLJ 302 (CA). It was explained that judicial review is not an appeal from an administrative decision and therefore the court is not entitled in judicial review to consider whether the administrative decision itself was fair and reasonable. Hence, it is often said that in judicial review the court is concerned not with the decision but the decision making process. But that is not to say that the examination of the decision making process is confined only to whether the various overt steps in the process had been adhered to.

[15] In *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9; [1990] 1 CLJ Rep 195 (SC), it was held that:

> … So long, as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute.

[16] In *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105 (FC), the Federal Court had had further elaborated upon the judicial review jurisdiction as follows:

> It is often said that judicial review is concerned not with the decision but the decision making process (see eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions and Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
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> But Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.
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> In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:
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> > By 'illegality' as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> >
> > By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could arrive at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or less there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its feet as an accepted ground on which a decision may be attacked by judicial review.

> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development.

[17] Hence, if the grounds for judicial review had been misunderstood to be confined to ultra vires and overt compliance with procedure, it has now been clarified that the examination encompasses whether there is illegality, irrationality or procedural impropriety. On these three grounds, it is clear that examination of the decision making process is to see whether there is abuse and mis-use of the administrative discretion, thus ensuring that the administrative discretion is exercised for the purpose it is given, and on that ground is fairly and justly exercised. 'Proportionality' was stated to be a fourth ground for judicial review which called for further development. The cautious approach is appropriate as that concept is not necessarily confined to abuse or misuse of the administrative discretion but could inadvertently transgress into interference with the discretion granted to the executive.

[18] In the instant appeal, the learned judge conducting the judicial review examined s 7(1) and apprised himself of the precedent objective facts before the absolute discretion arose to be exercised. Then taking into consideration the fact not disputed that the book had been in circulation for two years before the order to prohibit it was made, and that there was no evidence shown of prejudice to public order during that period, the learned judge questioned the exercise of the discretion and quashed the order to prohibit the book. It was clearly an examination confined to the decision making process as to whether it was illegal, or irrational in the particular circumstances. We find the submission that the learned judge had proceeded with the judicial review as an appeal to be without merit.

[19] That submission was followed with the further submission that the learned judge erred in confining his consideration to prejudice to public order and failed to appreciate the wider meaning of 'prejudicial to public order'. We find this submission to be an exercise of superficial labelling and equally without merit. If no evidence of actual prejudice to public order was produced, the conclusion must be that no prejudice to public order had occurred. If in the two years that the book was in circulation no prejudice to public order had occurred, it follows that the book was in the first place unlikely to be prejudicial to public order. The appellant obviously did not rely on that ground. The

appellant relied upon the ground that the book was prejudicial to public order. But it also follows that if no prejudice to public order had occurred in the two years, the book could not be prejudicial to public order. The appellant relied on being satisfied that the book was prejudicial to public order. To be satisfied that the book was prejudicial to public order in the face of the fact there was no prejudice to public order in the two years the book was in circulation, is in such outrageous defiance of logic that it falls squarely within the meaning of *Wednesbury* unreasonableness, and of irrationality.

[20] The learned judge considered the fact JAKIM considered the book to have infringed JAKIM guidelines. The learned judge found:

> It is apparent from this concluding paragraph that according to JAKIM at least, the publication was prohibited because of its tendency to confuse Muslims, particularly Muslim women. Further, the publication was found to contain statements regarding the religion of Islam based on the personal understanding of the authors and it was of concern that this might contuse Muslims, particularly those with shallow knowledge of the religion. Again it must be stressed that the conclusion does not address the issue of the publication being directly prejudicial to public order.

[21] We are of the view that even if there is a breach of JAKIM guidelines that does not address the issue of the book being prejudicial to public order. We agree with the learned judge that the decision by the appellant was, in the circumstances, flawed and not exercised in accordance with s 7(1) of the Printing Presses and Publications Act 1984.

[22] The respondent had submitted upon procedural impropriety arising from not giving the respondent an opportunity to be heard before the order was made to prohibit the book because the respondent had a legitimate expectation it would not be prohibited in view of the fact the book had been in circulation for two years. It is a submission that strays from the issues raised in the appeal by the appellant. It was unnecessary. We need not address it further except to say that at the end of the passage in *Council of Civil Service Unions and Ors v Minister for the Civil Service* [1985] AC 374 quoted above, Lord Diplock drew a distinction between an exercise of administrative decision and an administrative tribunal.

[23] We dismiss the appeal with costs fixed at RM20,000 and affirm the decision of the High Court.

Appeal dismissed with costs.

Reported by Ashok Kumar